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In The

Supreme Court of the United States

October Term, 1946

No.

Kiyoichi Fujikawa, Robert K. Murakami, Masaji Marumoto, Tasuku Komeya, Hayami Hasegawa, Shoichi Kawasaki, Kazue Minami, Masao Uno, Hisaji Onouye and Kanji Mayeda, minority stockholders of Pacific Bank,

Petitioners and Appellants below,

vs.

The Sunrise Soda Water Works Company, and Karl W. Greene, Richard D. Welsh and Wilfred J. Serpas, Trustees upon Dissolution of Pacific Bank, Inc., et al.,

Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action for declaratory judgment brought in the United States District Court for the Territory of Hawaii by Roger E. Brooks, as Receiver of Pacific Bank,

and as an officer of the United States, acting under authority conferred upon him pursuant to the Trading With the Enemy Act, as amended by the First War Powers Act of 1941, 50 U. S. C., Appendix (R. 7, 13).

This case squarely raises questions relating to the interpretation of the Trading with the Enemy Act, as amended, particularly the exculpatory clause in Section 5 (b) (2), and whether persons who have complied with the demands of the United States Government thereunder nevertheless shall be held liable to their creditors for failure to contest such demands.

Pacific Bank was organized under the laws of the Territory of Hawaii and did business in Honolulu, Hawaii (R. 145). It had an authorized capital of $200,000, a paid in capital of $155,000 (R. 147), and deposits of approximately $2,700,000. (R. 33). It had 4,000 shares of common stock outstanding, of which approximately 80% were owned by Japanese aliens (R. 161). Stockholders owning 2,878 shares, or 71.95% of the outstanding shares were either interned by order of the Military Governor of Hawaii or resided in Japan (R. 64). Their shares were vested by the Alien Property Custodian under Vesting Order No. 1500, dated May 18, 1943 (R. 63).*

The Petitioners herein and the class of minority stockholders they represent, who own approximately 28% of the outstanding stock, are United States citizens or residents of Honolulu, and are not under detention (R. 148).

The officers of the Bank were a president, a vice-president, a secretary-cashier, and three assistant cashiers. All of these officers, except one assistant cashier, were Japanese aliens (R. 145, 166-168). Daizo Sumida, presi-

*By Act of March 8, 1946, authorizing the divesting and return of vested property to enemy aliens who have been in this country throughout the war, although they were interned, certain of these shares which Petitioners compute at approximately 1660 may be returned to their original owners. (R. 148)

dent, and Totaro Matsui, secretary-cashier, were interned by order of the Military Governor of Hawaii (R. 65). Seizo Yamamoto, vice-president, was in Japan (R. 167-168).

The Bank had nine directors, of whom eight were Japanese aliens (R. 169). Of these directors, five were interned and one was in Japan (R. 64, 169). The Bank also had three managing directors, all of whom were Japanese aliens (R. 168). Two of these managing directors, Daizo Sumida and Taichi Sato, were interned, and the other, Seizo Yamamoto, was in Japan (R. 64).

At all times material to this action, Pacific Bank was solvent (R. 459). There is no evidence in the record that the Pacific Bank, its officers, directors, or stockholders, committed any act in violation of any law or which would have justified seizing its assets, closing its doors or suspending its business, and no reason other than the Japanese attack on Pearl Harbor and the consequent state of war is advanced for such termination of business and seizure.

On April 10, 1940, the President of the United States, pursuant to authority vested in him by section 5 (b) of the Trading with the Enemy Act, as amended, issued Executive Order 8389, forbidding certain transactions by or with designated foreign nationals, including all payments by or to any banking institutions, unless licensed or otherwise authorized by the Secretary of the Treasury (R. 175-177). Pacific Bank became subject to the order on July 26, 1941, when the order was made applicable to nationals of Japan (R. 179). However, there was no interruption in the normal business of Pacific Bank, for on the same date the Secretary of the Treasury issued General License No. 66, which permitted the bank to continue operations which otherwise would have been prohibited by the order (R. 216).

From about July 28, 1941, until December 7, 1941, Grant C. Helming, who was officially attached to the 12th Federal Reserve District in Northern California as a national bank examiner, but who was on special assignment to the Office of Foreign Funds Control in the Territory of Hawaii, had supervision of the Pacific Bank (R. 416-417). On December 7, 1941, General License No. 66 was revoked with respect to Pacific Bank by Public Circular No. 8 (R. 225). On the same date, the United States through Mr. Helming, acting under direction of the Treasury Department, took physical possession of the Pacific Bank, its books and its assets, denied the officers and directors of the Bank access to the Bank, its books and assets, and immediately thereafter removed the cash and deposited it with another bank, sealed the vault, changed the combination on the vault and closed the bank to all business (R. 143, 350, 418, 501, 509-510). Besides Pacific Bank, two other Japanese controlled banks in Hawaii, namely the Yokohama Specie Bank, Ltd., and the Sumitomo Bank of Hawaii, were similarly closed and taken into custody as a result of the partial revocation of General License No. 66 and instructions from the Treasury Department (R. 443).

The actual seizure of Pacific Bank and the other two above named Japanese controlled banks and exclusion of their officers and directors were in contrast with the mere temporary "freezing" and subsequent operation under supervision of certain other financial houses in Honolulu which were not Japanese banks.

Neither the Pacific Bank, nor the other two above named Japanese banks, were permitted again to open their doors for business (R. 433, 460). None of the banks throughout the United States closed under the Trading with the Enemy Act, as amended, have been permitted to reopen (R. 438).

Upon taking possession, Mr. Helming opened his own set of books, listed all assets and all liabilities of the

Bank, collected cash items as they became due, deposited such cash in one of the local operating banks, and remained in charge until his successor was appointed and took possession (R. 416, 426-430, 506).

On December 9, 1941, the Treasury Department, over the signature of the Acting Secretary of the Treasury, issued CONFIDENTIAL CIRCULAR NO. 78, to persons in authority who were controlling and licensing foreign nationals, which in part provided:

> "You should not license the operation of any Japanese bank, steamship agency, or shipping concern and no such concern should be allowed to operate."

(This document was not introduced in evidence in the District Court, but is referred to in, and printed as an appendix to the brief of the Alien Property Custodian in the Court below. It is printed as an appendix to this petition and brief. *Infra* pp. 1a-5a).

Although no formal application for special license to resume operations was made by Pacific Bank, or the other two above named Japanese banks, on December 15, 1941, Governor Poindexter of Hawaii cabled to J. W. Pehle, Assistant to the Secretary of the Treasury, referring to a plan to liquidate the closed Japanese banks, advising that considerable number of local businesses had their own

Inasmuch as Public Circular No. 5 revoked all general and ecific licenses including General License No. 66 in so far as y authorized transactions by Japanese nationals, but was si- nt as to nationals of other countries, the three Hawaiian banks ch were not Japanese controlled continued to operate under eral License No. 66. On December 20, 1941 the Treasury De- tment issued Public Circular No. 5A reinstating all general enses to the extent that they were revoked by Public Circular 5 excepting certain licenses enumerated therein, including eral License No. 66. (R. 226,333-341)

which the Bank and its depositors found themselves, and asking for appropriate relief. On January 2, 1942, Governor Poindexter replied to Mr. Patterson stating he had

been in communication with Washington and had been promised instructions as rapidly as possible. On January 13, 1942, Governor Poindexter received a cable from Washington authorizing liquidation of (A) the Pacific Bank, (B) the Sumitomo Bank of Hawaii and (C) the Yokohama Specie Bank Ltd. On January 17, 1942, Governor Poindexter cabled the Secretary of the Treasury for further instructions. On February 16, 1942, the Secretary of the Treasury replied that liquidation of these three banks should be effected as indicated in his cable of January 13; that he had designated the Controller of the Currency to supervise liquidation, and that the Controller had designated Roger E. Brooks to act for him with full responsibility to proceed under section 5B of the Trading with the Enemy Act, as amended (R. 527-533, 537-538).

On February 28, 1942, the Governor of Hawaii, exercising powers delegated to him under section 5 (b) of the Trading with the Enemy Act, as amended by the First War Powers Act of 1941 (55 Stat. 839), entered an order declaring Pacific Bank *to have been in liquidation since December 7, 1941,* and directing that liquidation continue until completed. By the order Roger E. Brooks was appointed Receiver with full authority to continue with the liquidation under section 5 (b) of the Trading with the Enemy Act, as amended (R. 138).

On April 20, 1942 the Receiver first published notice to the depositors and other creditors of the Bank to present their claims, and claims aggregating $2,677,609.81 were filed with him (R. 14, 15). About 60% of the total amount of the claims belonged to or were controlled by Japanese nationals (R. 269). On October 28, 1942, the Receiver announced a dividend of 100% on the claims (R. 157).

On October 29, 1942, Roger E. Brooks as Receiver instituted a class action in the United States District Court

for the Territory of Hawaii against (a) the petitioners herein and others representing all stockholders, (b) the respondent Sunrise Soda Water Works Co., herein and others representing all Depositor-Creditor-Claimants, (c) Saiki and others representing all Depositor-Creditor-Non-Claimants and (d) Kyodo Printing Co. and others representing all Non-Depositor-Creditors of the Pacific Bank, alleging that he had sufficient money and assets after payment of claims to pay "interest thereon at the legal rate of 6 percentum per annum from and after December 6, 1941, to date, amounting to approximately $145,000.", and seeking an adjudication whether such interest should be paid (R. 3, 6, 16-17).

The parties are in agreement that such payment would not technically constitute "interest" on these claims, but rather damages measured by the legal rate of interest in Hawaii arising from the failure of the Bank to pay claimants until October 28, 1942 (R. 134, 242). Commercial accounts regularly carried no interest; time and savings accounts bore interest ranging from ½ to 1½ per cent per annum (R. 164).

The stockholders of the Bank contended that such interest was not payable because the Trading with the Enemy Act, as amended, and the action taken thereunder by officials of the United States Government rendered the performance by the bank of its contracts with depositors and other creditors impossible and relieved the bank and the stockholders of all contractual obligations and any liability thereunder (R. 133).

The creditors contended that this defense was not available to the stockholders because they had made no attempt to obtain a special license from the Secretary of the Treasury after the revocation of General License No. 66 and the seizure of the bank by the United States Government (R. 135).

After holding that this is a "true class action" on December 23, 1942 (R. 29-31), entering its first Findings and Conclusions on February 9, 1943 (R. 31-45), permitting the Alien Property Custodian, who assumed control of the Pacific Bank on April 29, 1943 (R. 58-62) and vested 2,878 shares of Pacific Bank on May 18, 1943 (R. 63-68) to enter appearance on November 17, 1943 (R. 30), making Pacific Bank a party plaintiff on January 21, 1944 (R. 51-54), allowing an amendment of the complaint on February 25, 1944 (R. 54-55), filing its Amended Findings and Conclusions on February 29, 1944 (R. 68-80), granting a motion joined in by all parties for a new trial in March, 1944, and thereafter taking additional evidence, the District Court on September 16, 1944 filed its Second Amended Findings and Conclusions (R. 83-99) and on January 18, 1945 entered judgment. (R. 100)

The District Court adjudged that interest was payable at the rate of 6 per cent per annum from December 7, 1941, to October 27, 1942, upon a finding "that no active measure was taken by the stockholders or anyone in their behalf to obtain any form of relief for themselves or the creditors of the bank from the operation of the Order and Orders of Government Agents, freezing and then liquidating the assets of the bank" (R. 99). This finding led the District Court to the conclusion that the stockholders had not established impossibility of performance of their contracts with the depositors and other creditors of the bank. The District Court did not pass upon the question whether the stockholders were relieved of these contractual obligations by section 5 (b) (2) of the Trading with the Enemy Act.

Notice of appeal was filed by the petitioners herein on April 12, 1945 and by the Alien Property Custodian on April 16, 1945 (R. 102-104).

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. In so doing, the Circuit Court of Appeals made a finding similar to that of the District Court, quoted above, and also reached the conclusion that the stockholders had not established impossibility of performance of their contractual obligations. The Circuit Court's conclusion on this point was based on the ground that the officials had not sought a special license to reopen the bank from the Secretary of the Treasury *himself*. (R. 656-657).

The Circuit Court of Appeals also concluded that the omission by the officials of the bank to apply to the Secretary of the Treasury *himself* for a special license to reopen the bank, "shows an absence of 'good faith' of Section 5 (b) (2) of the Trading with the Enemy Act," (R. 657).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. 347 (a)). The decree of the Circuit Court of Appeals for the Ninth Circuit was entered on December 5, 1946 (R. 662). On March 3, 1947, this Court granted an extension of time for filing petition for certiorari to and including April 4, 1947.

It is contended that the Supreme Court has jurisdiction to review the decree here in question because:

1. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit, rendered July 6, 1946 in *Silesian-American Corporation v. Markham, Alien Property Custodian*, 156 Fed. (2) 793 (certiorari denied, October 14, 1946, 67 S. Ct., 87, but subsequently allowed February 17, 1947 because of conflict with decision of U. S. Court of Appeals for the District of Columbia, rendered October 21, 1946, in *Uebersee-Finanz Korp. v. Markham, Alien Property Custodian* ~~(unreported)~~, 158 Fed. (2d) 313).

2. This case involves an important question of Federal law which has not been, but should be settled by this Court, to wit, the applicable provisions of the Trading with the Enemy Act, as amended, particularly Section 5 (b) (2).

3. Seizure of the assets of Pacific Bank and distribution thereof to Depositors and Creditors in excess of their contractual claims to the detriment of the Shareholders constitutes a denial of due process under the Fifth Amendment to the Constitution.

QUESTIONS PRESENTED

The following questions are herein presented:

(1) When the United States through its duly authorized officers is fully advised of the facts relating to the problems of a bank and its depositors, and thereafter, acting by virtue of the authority set forth in the Trading with the Enemy Act, as amended, and the Executive Orders and regulations issued thereunder, the United States by its duly authorized officers prohibits the operation of the bank, seizes the bank's assets to prevent its operation, and liquidates the bank, must the bank formally apply to the Secretary of the Treasury *himself* for a special license to resume operations, before it has established impossibility of performance of its contractual obligations?

(2) When the United States through its duly authorized officers acting by virtue of the authority set forth in the Trading with the Enemy Act, as amended, and the Executive Orders and regulations issued thereunder, requires delivery to it of the assets of a bank, does Section 5 (b) (2) of the Act provide the bank with a full acquittance and discharge for all purposes of its obligations relating to such assets?

(3) Assuming that in the circumstances set forth in question (2) above, Section 5 (b) (2) of the Act does

provide the bank with a full acquittance and discharge for all purposes of such obligations, is that acquittance and discharge vitiated by the subsequent omission by the bank, its officials and stockholders to formally apply to the Secretary of the Treasury *himself* for a special license to resume operations?

(4) Does the distribution of the assets of the bank, seized by the United States, to the depositors and creditors in excess of their contractual claims to the detriment of the shareholders in the circumstances of this case constitute a denial of due process under the Fifth Amendment to the Constitution?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case involves important Federal questions. Several of these questions relating to the administration of the Trading with the Enemy Act, as amended, are the subject of conflicting decisions by the Second and Ninth Circuit Court of Appeals. None of these questions have been, but should be settled by this Court. The questions are of great public importance, and if this Court does not grant this writ of certiorari to resolve the conflict in the decisions just noted above, the law will be left in a state of confusion.

Every person who was custodian of alien property and who made delivery thereof to or for the account of the United States pursuant to the demands made upon him by virtue of the authority set forth in the Trading with the Enemy Act, as amended, and the Executive Orders and regulations issued thereunder, and who thereafter omitted to do any act which might possibly have enabled such person to immediately return the property to the owner, will be subject to claims for damages. Also, every person, who was custodian of alien property which was

"frozen" in his custody by virtue of the authority set forth in the same Act, Executive Orders and regulations issued thereunder, and who thereafter omitted to apply for a special license to pay over the property to aliens who demanded the same, will be subject to claims for damages. This would open the Court to an avalanche of litigation and would place in jeopardy the financial structure of not only all Japanese controlled banks in the United States but all financial houses which had custody of alien property at the outbreak of World War II.

If this country should again be faced with a national emergency requiring it to safeguard its very existence by peremptorily reducing to its possession and applying to its use all property which lies within its power, that power will be emasculated by the delays of private litigation if persons cannot rely on the statutory protection intended to be given in section 5 (b) (2) of the Trading with the Enemy Act.

There is a line of cases holding that seizure of alien property by the United States under the Trading with the Enemy Act is constitutional in view of the fact that American citizens and friendly aliens are safeguarded. If the United States is permitted to make distribution of such seized assets to one class of persons in excess of contractual claims of such class and to the detriment of another class of persons, such safeguards no longer exist and such action is unconstitutional. This Court will not sanction interpretation of a Federal statute in a manner which will render it unconstitutional when it may be interpreted in another manner which is constitutional. *Central Union Trust Company v. Garvan,* 254 U. S. 554; *Stoeher v. Wallace,* 255 U. S. 239 and *Becker Steel Company v. Cummings,* 296 U. S. 74.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the

United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said court had in the case numbered and entitled on its docket, No. 11081, Kiyoichi Fujikawa, et al., Appellants, vs. The Sunrise Soda Water Works Company, and Karl W. Greene, Richard D. Welsh and Wilfred J. Serpas, Trustees upon Dissolution of Pacific Bank, Appellees, and Tom C. Clark, Attorney General, Appellant, vs. The Sunrise Soda Works Company, et al., Appellees, to the end that this case may be reviewed and determined by this court as provided for by the statutes of the United States, and that the decree herein of the said court be reversed by this court, and for such further relief as to this court may seem proper.

KIYOICHI FUJIKAWA,
ROBERT K. MURAKAMI,
MASAJI MARUMOTO,
TASUKU KOMEYA,
HAYAMI HASEGAWA,
SHOICHI KAWASAKI,
KAZUE MINAMI,
MASAO UNO,
HISAJI ONOUYE
and
KANJI MAYEDA,

By R. A. VITOUSEK
MASAJI MARUMOTO
HENRY F. BUTLER
Counsel for Petitioners

IN THE

Supreme Court of the United States

October Term, 1946

No.

KIYOICHI FUJIKAWA, ROBERT K. MURAKAMI, MASAJI MARUMOTO, TASUKU KOMEYA, HAYAMI HASEGAWA, SHOICHI KAWASAKI, KAZUE MINAMI, MASAO UNO, HISAJI ONOUYE and KANJI MAYEDA, minority stockholders of Pacific Bank,

Petitioners and Appellants below,

vs.

THE SUNRISE SODA WATER WORKS COMPANY, and KARL W. GREENE, RICHARD D. WELSH and WILFRED J. SERPAS, Trustees upon Dissolution of Pacific Bank, Inc., et al.,

Respondents and Appellees below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is printed in full in the record (R 650-661).

JURISDICTION

1. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. 347 (a)).

2. The date of the decree in the Court below is December 5, 1946 (R 662). This Court on March 3, 1947 granted

an extension of time for filing petition for certiorari to and including April 4, 1947.

3. This Court, in the exercise of its sound judicial discretion, consistently has granted review by writ of certiorari where there are special and important reasons, such as the need for determination by this Court of questions of public importance involved in the administration of Federal laws, and especially where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter;

Bowles v. United States, 319 U. S. 33 (Selective Service and Training Act)

O'Donnell v. Great Lakes Dredge and Dock Company, 318 U. S. 36 (Jones Act)

Walling v. Belo Corporation, 316 U. S. 624 (Federal Fair Labor Standard Act)

Silesian-American Corporation v. Markham, Alien Property Custodian, 156 F (2) 793, (The Trading With the Enemy Act, as amended)

Uebersee Finanz Korporation v. Markham, Alien Property Custodian, U. S. Ct. Apps., D. C., 158 F (2) 313. (The Trading With the Enemy Act, as amended)

4. Seizure by the United States of a Bank not in default and distribution of its assets to depositors and creditors in excess of their contractual claims, to the detriment and loss of its stockholders, is not authorized under the Trading with the Enemy Act, as amended, and constitutes denial of due process under the V Amendment to the Constitution. This Court will take jurisdiction of cases involving the constitutionality of Federal laws.

STATEMENT OF THE CASE

The case already has been stated in the preceding petition under Summary Statement of the Matter Involved (pp 1-9), which is incorporated herein by reference.

SPECIFICATION OF ERRORS

The Court of Appeals erred,

1. In affirming the judgment of the District Court that the depositors and creditors of Pacific Bank are entitled to interest (as damages) at the legal rate of 6% per annum on their claims from December 7, 1941 to October 27, 1942.

2. In ruling that revocation of the bank's license to operate and seizure of its assets by the United States Government did not render performance by the bank of its contractual obligations impossible.

3. In ruling that following seizure by the United States Government the bank, its officers and directors were under obligation to apply for a Treasury License to resume operations.

4. In ruling that omission of the stockholders to apply for a special license to resume operation after the bank had been seized showed an absence of "good faith" as that term is used in Section 5 (b) (2) of the Trading With the Enemy Act and consequently that they were not relieved from liability thereunder.

5. In interpreting the provisions of the Trading With the Enemy Act in a manner to render it unconstitutional by resulting in the taking of property from the stockholders without due process, in violation of the Fifth Amendment of the Constitution.

ARGUMENT

I

Revocation of General License No. 66 Rendered Performance of its Contract by Pacific Bank Impossible and Excused it from Liability for Payment of Interest.

Pacific Bank was subject to Executive Order 8389, as amended, on and after July 26, 1941, but until December 7, 1941, it was permitted to continue its normal business under General License No. 66. Upon the revocation of General License No. 66 on December 7, 1941, its operation automatically was terminated. On that same date, a representative of the United States Government took possession of the bank, its books and assets, and thereafter denied access to such books and assets to its officers and directors (R 143, 509-510). The Bank had met every demand made upon it through the close of business on December 6, 1941 (R 459). Seizure of the Bank by the United States was not on account of any default of its officers or directors, but on account of the commencement of hostilities. The delay in paying depositors and creditors after December 7, 1941 was not occasioned by any default of the Bank, but was due solely to the closing of the Bank, its physical seizure and liquidation by agents of the Secretary of the Treasury.

The law excuses nonperformance of a contract where the performance is rendered impossible by sovereign act. Professor Williston, in his treatise on the Law of Contract (revised edition), Volume VI, page 5434, states: "Clearly, prevention by an executive or administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual."

In Re-statement of the Law of Contracts, Section 458, it is stated that a contractual duty or a duty to make

compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States.

The same principle is illustrated in the case of *McLemore v. Louisiana State Bank*, 91 U. S. 27, where a bank, through no fault of its own, was closed and put in liquidation in the exercise of war powers, and a creditor thereafter complained of loss suffered by reason of the liquidation. The court held that the bank was not responsible for the loss suffered by a creditor under such circumstances.

II

Formal Application for a License Should Not Be Required Where the Treasury Department Was Advised of the Problems of the Bank and its Depositors and Had the Same Under Consideration.

The reason for requiring an application for a license to be filed is to apprise the licensing authority of the facts in connection with the applicant and the necessity for the license.

After the partial revocation of General License No. 66 by Public Circular No. 8 on December 7, 1941, messages were exchanged between local office of Foreign Funds Control, the Governor of Hawaii, and the Treasury Department in Washington (R 529-533, 537). These messages show that the problems of the Japanese banks in Hawaii had the close attention of the representative of the Treasury Department in Hawaii and that the Treasury Department in Washington was fully advised of the situation (R 529). On the basis of facts before it, the Treasury Department

in Washington ordered the liquidation of the Japanese banks in Hawaii (R 537).

Under Treasury Regulations any person having an interest may apply for a license permitting transactions involving "frozen" funds. Fred Patterson, for many years attorney for Pacific Bank, and who kept his office account there, applied to Governor Poindexter, the representative in Hawaii of the Treasury Department, for relief. Governor Poindexter treated Mr. Patterson's request practically in the nature of an application for license, and had it been the policy of the Treasury Department to permit any of these Japanese banks to open or conduct even a restricted business, he could have issued a license then and there (R. 527-533, 537-538). In the circumstances, it cannot properly be said that no application for a license was made, but merely that no "formal" application was filed. This Court will look to the substance, and not to the mere form of such a matter.

Assuming that Pacific Bank had filed a formal application for a license with the Governor of Hawaii, in the form and manner prescribed under Executive Order 8389, as amended (R. 373), there is no question that the Governor would have requested instructions from the Treasury Department in Washington. Here, although no formal application for license was filed, the Treasury Department was fully advised of the problems of the Japanese banks in Hawaii, including Pacific Bank, and had the matter under consideration.

What would have been the result of filing formal application? On December 9, 1941, the Acting Secretary of the Treasury issued Confidential Circular No. 78 directing that no Japanese bank should be licensed to operate. (Appendix pp. 1a-5a). From this circular and the subsequent communications between the Governor of Hawaii and Washington (R. 527-533, 537-538, 637-648) it is ap-

parent that the Treasury Department at all times since December 7, 1941 consistently maintained the position that Japanese banks should not be permitted to reopen. This is confirmed by the fact that none of the Japanese banks closed under the Trading with the Enemy Act have been permitted to reopen, whether located in Hawaii or on the mainland. Thus it is perfectly obvious that a license to reopen would not have been granted to Pacific Bank, and to have applied would have been futile.

The Circuit Court of Appeals ruled that the instruction in Confidential Circular No. 78 issued to subordinates of the Secretary of the Treasury did not relieve the officials of Pacific Bank from seeking a license from the Secretary himself, pointing out that the formal, printed application form contains the words "To the Secretary of the Treasury, Washington, D. C." (R. 656, 657). To any one familiar with governmental procedure it is so obvious that the Secretary of the Treasury could not possibly personally consider such applications that this ruling does not appear to be founded on substance. The gesture would

On December 20, 1941, after it had had ample time to consider l of the problems involved, the Treasury Department issued Public ircular No. 8A reinstating numerous General Licenses to the extent t they were revoked by Public Circular No. 8, but specifically ating therein that General License No. 66 was not reinstated.

This constituted a definite ruling by the Treasury Department t Pacific Bank, Sumitomo Bank of Hawaii and Yokohama Specie k, Ltd. should not be licensed and in effect confirmed the ure of those banks which had taken place on December 7, 1941 . 226, 333-341). This is made clear by Treasury Department Press leases Nos. 17 and 20, which were issued simultaneously with lic Circulars Nos. 8 and 8A respectively. (See United States asury Department publication dated June 15, 1945 comprising UMENTS PERTAINING TO FOREIGN FUNDS CONTROL, pages 91, 92).

III

The Bank Having Surrendered its Property to the United States in Compliance with Demands Made Under the Trading with the Enemy Act, as Amended, Is Relieved from Liability to its Depositors and Creditors in Regard Thereto by the Exculpatory Clause in Section 5 (b) (2) of the Act.

The Trading with the Enemy Act was passed during World War I. After World War II had commenced, but before the United States was at war, Congress amended that Act, and again on December 18, 1941, it amended Section 5 (b) (2) of the Act to provide:

> "The payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder, shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted *in good faith* in connection with the administration of, or in pursuance of and in reliance of, this sub-division, or any rule, regulation, instruction, or direction issued hereunder." (Emphasis by italics supplied)

To understand the meaning of the exculpatory clause in Section 5 (b) (2) of the Trading with the Enemy Act, as amended, it is well to consider its statutory background and its legislative history. This provision first appeared in the original Act, adopted during World War I as Section 7(e) which provided:

> "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." (Oct. 6, 1917, c. 106, s. 7; 40 Stat. 416; Nov. 4, 1918, c. 201, s. 1; 40 Stat. 1020.)

In deciding cases arising out of the seizure of property by the Alien Property Custodian during World War I, the courts uniformly held that the above-quoted provision gave persons delivering property pursuant to the demand of the Alien Property Custodian—whether that property ultimately was or was not determined to have enemy alien character—absolute protection against liability on the claims of their creditors.

American Exch. Nat. Bank v. Garvan, Alien Property Custodian (C. C. A. 2nd, 1921) 273 F. 43, 260 U. S. 706.

Farmers' Loan & Trust Co. v. Hicks (C. C. A. 2nd, 1925) 9 F. (2) 848, cert. den. 269, U. S. 583.

Garvan v. Commercial Trust Co. (D. C. N. J., 1921) 275 F. 841.

Wageck v. Travellers Ins. Co., 177 N. Y. S. 329.

The legislative purpose of Congress in first amending Section 5 (b) of the Act on May 7, 1940 (c. 185 § 1, 54 Stat. 179) was to give the Treasury "freezing control" over property in which *any foreign national* (as distinguished from enemy alien) had an interest. This "freezing control" protected foreign nationals of friendly countries and their property in this country from transactions and transfers which otherwise might have been forced upon them by the Germans and also prevented transactions in this property prejudicial to the best interest of the United States.

The legislative purpose of Congress in again amending Section 5 (b) of the Act, by Title III of the First War Powers Act of December 18, 1941 (c. 593, Title III, § 301,

55 Stat. 839) was to add to this system of "freezing control" the power actually to seize and compel the use of this property of friendly foreign nationals in such manner as would enhance the war efforts of the United States. In other words, the latter amendment was designed to give the Executive Branch of the Government the same power over *all alien property* which the Executive branch previously had exercised over *enemy alien property* pursuant to the authority set forth in the Trading With the Enemy Act of 1917, and to add thereto a flexibility of control which experience under "freezing control" had demonstrated to be advisable. (Senate Report No. 911 (77th Congress, 1941) Serial 10546; House Report No. 1507 (77th Congress, 1941) Serial 10558; Congressional Record, Dec. 16, 1941, vol. 87, p. 9861, Mr. Hancock.)

Without disturbing or making any reference to Section 7 (e) of the Act, as quoted above, on December 18, 1941, Congress enacted Section 5 (b) (2) in its present language.

This apparently was done to assure the same protection during World War II under the enlarged scope of the power given to the Executive under the new legislation that had been assured in Section 7 (e) of the Trading with the Enemy Act. There was little discussion regarding Section 5 (b) (2).

The House Judiciary Committee on December 12, 1941, held an informal closed hearing on HR. 6206, and the Senate Judiciary Committee on December 15, 1941, held an informal closed hearing on S. 2129, the bills in which this legislation was introduced, but there is no record of any discussion regarding the exculpatory clause.

When the proposed amendment reached the floor of the House, the only reference to the exculpatory clause was by Congressman Hancock who, in explaining the bill, said:

> "The acquittance provision at the bottom of page 6 is in the present law:

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, restriction, or direction issued hereunder ~~which~~ to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same;"

"You will find it in Section 7 (e) of the Trading with the Enemy Act.

"There is nothing new or strange or startling about this, although a good many people have asked me about it. It simply means that if operating under a regulation or order, you turn over some property which belongs to another person to the Alien Property Custodian, *that person has no cause of action against you,* but his remedy must be sought against the Alien Property Custodian." (Emphasis by italics supplied.) (Cong. Rec., Dec. 16, 1941, Vol. 87, Page 9861).

The House Report and the Senate Report which accompanied this proposed legislation onto the floor of Congress made no mention of the addition of the phrase "in good faith" to the exculpatory clause included therein. (House Report No. 1507, 77th Congress, December 15, 1941, House Reports, Vol. 7, Serial 10558; Senate Report No. 911, 77th Congress, December 15, 1941, Senate Reports Vol. 4, Serial 10546).

Section 7 (e) of the Trading with the Enemy Act of 1917, as construed by the Courts, gave persons ample protection when they delivered property of enemy aliens to the Alien Property Custodian during World War I. It is evident from the foregoing that when Congress gave the Executive Department of the Government the power to seize and compel the use of property belonging to friendly aliens, Congress intended to give exactly the same protection to persons delivering such property pursuant to the demands of a duly authorized officer of the United

States. Congress did not intend to change the law in this respect. The reason therefor is aptly stated by Judge Learned Hand in *Silesian American Corporation v. Markham, Alien Property Custodian,* 156 Fed. (2) 793.

> "The power of the United States peremptorily to reduce to its possession and apply to its use, at moments critical in its history, all property which lies within its power, is not to be emasculated by the delays of private litigation; the peril may be overwhelming, the need imperative. It is enough that reparation will be available, where reparation is due; meanwhile the individual must comply with the immediate demands * * *."

In this same case Judge Learned Hand also stated:

> "The debtor [upon whom a demand had been made by the Alien Property Custodian] has no interest in the controversy, legally recognizable, except to be protected against any claims by the pledgee, or by the Swiss corporation in whose name the shares are registered. * * *; and our inquiry may therefore be confined to whether Section 5 (b) (2) of the Trading with the Enemy Act provides protection to the debtor."
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> * * * * *
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> "The difficulties arise from the amendment in 1941 of Section 5 (b) of the Trading with the Enemy Act. Until that time Section 7 (c) was the only provision which gave power to the President to compel the transfer of alien property; and it was limited to property of an enemy or of an ally of an enemy; for although Section 5 (b) authorized very wide power to investigate, it did not touch transfers. However, the amendment in 1941—in Subsection (B) of Subdivision one—gave power to the President not only to investigate "transactions involving, any property in which any foreign country or national thereof has any interest," but to "compel any * * * transfer of such property;"
>
> * * * * *
>
> "Subsection (2) of Section 5 (b) declares that compliance with any demand of the Custodian shall be a discharge of any "obligation" of the person upon

whom it is made, and a defense in any court against being held "liable". * * * This was necessary in spite of Section 7 (c) because of the enlarged scope of Section 5 (b); and left the friendly alien without any remedy against the person who made the transfer."

In the case of *Alexewizc v. General Aniline & Film Corporation,* 43 N. Y. S. (2) 713, the Supreme Court of New York State had under consideration a suit for breach of contract. The plaintiff's employment contract with the defendant had been terminated by an order of a representative of the Secretary of Treasury who took over the possession of the defendant's office and assumed active supervision of his business. The Court said:

"Under the present (Trading with the Enemy) Act although commercial intercourse with a foreign national is not absolutely forbidden, it is a matter subject to Governmental control. In the instant case the continuance of the plaintiff's contract with the defendant, a foreign national, has been forbidden. Recovery,therefore either from the Government Agency or from the defendant himself, may not be had." (Title in parentheses supplied for clarity.)

* * * * *

"The more recent cases arising in connection with the present National Emergency, reach a similar conclusion and hold that where a contract, valid at its inception, is rendered unlawful by Governmental decree adopted as part of the War effort, performance is excused.

"Indeed, even if the Secretary of the Treasury lacked the authority to nullify the contract in question, the defendant would still be absolved from li- liability in the absence of a showing of lack of good faith." (The court then went on to quote Section 5 (b) (2) of the Trading With the Enemy Act, as amended).

The legislative history of this exculpatory provision and the two cases quoted above which construe the same, make clear that once delivery of property has been made

for the account of the United States pursuant to the demand of the Treasury Department or the Alien Property Custodian, the obligations and contracts in respect to that property of the person making that delivery are terminated. At that time the person making the delivery has an absolute and irrevocable "full acquittance and discharge" of his obligations and may not thereafter become "liable" in any court for and in respect to anything done or omitted in connection with the administration of, in pursuance of, and in reliance of, Section 5 (b) of the Trading With the Enemy Act, or any rule, regulation, instruction or direction issued thereunder.

Even if the "full acquittance and discharge" which the bank obtained under the provisions of Section 5 (b) (2) of the Act when it delivered its books and assets to the representative of the Treasury Department's Foreign Funds Control Division, could thereafter be vitiated by doing or omitting to do anything, when that act or omission showed a lack of "good faith", the omission on the part of the stockholders of the Pacific Bank to apply to the Secretary of the Treasury for special license to resume operation did not show an absence of "good faith", as that term is used in Section 5 (b) (2) of the Act.

The Courts have consistently held that when the term "good faith" is used in a statute in which that term is not defined, what is meant by the term must be drawn from the meaning of the words themselves, as interpreted by the context in which they are used, the purpose back of the statute, the mischiefs it was enacted to prevent, and the result it was enacted to accomplish. (*R. L. Witters Associates Inc. v. Ebsary Gypsum Co. Inc.*, 92 F (2) 746, C. C. A. 5, 1938; *Tennessee Pub. Co. v. American Bank*, 299 U. S. 18, 57 S. Ct. 85, 81 L. Ed. 13; *De Cano, et al. v. State*, 110 P. (2d) 627, 1941). In fact, the Circuit Court of Appeals for the Second Circuit in the case of *Stadtmuller v. Miller*, 11 F. (2) 732 (1926), stated:

> "In determining which meaning is to be attached to the words as set forth in the Trading With the Enemy Act, the court must keep in mind the legislative purpose as well as the context. It will always be presumed that the Congress intended to use language which would not lead to injustice."

As clearly shown by the Legislative history of this exculpatory clause and the Court decisions construing the same, the desire of Congress to give to the Executive branch of the Government the power peremptorily to reduce to its possession and to apply to its use, at moments critical in its history, all property which lies within its constitutional power, and the desire of Congress not to have this power emasculated by the delays of private litigation, was the purpose back of the amendment to Section 5 (b) of the Trading With the Enemy Act, the mischiefs it was enacted to prevent and the result it was enacted to accomplish. Viewed in this light, it clearly can be seen that the "good faith" required of persons delivering property pursuant to the demand of the Treasury Department or the Alien Property Custodian is merely a state of mind denoting honesty of purpose, freedom from intention to defraud the owners of the property, and faithfulness to the duty or obligation to their country, which takes precedence over and above the duty to their individual creditors.

The Circuit Court of Appeals for the Ninth Circuit in determining that the stockholders of the Pacific Bank showed lack of good faith in not applying for a special license to the Secretary of the Treasury to resume operation, did not determine the meaning of those words as they are used in Section 5 (b) (2) of the Trading With the Enemy Act, by interpreting them in the context in which they are used, the purpose back of the statute, the mischiefs it was enacted to prevent and the results it was enacted to accomplish. In fact, the Circuit Court of Appeals for the Ninth Circuit in seizing upon the definition

of the phrase "good faith" as set forth by the Michigan Supreme Court in *Bliss Petroleum v. McNally*, 254 Mich. 569, likened stockholders of the Pacific Bank to directors of a corporation who had purchased leases for $1.00 on their own account and then had the *bad faith* to sell the leases to the corporation for several thousand dollars during meetings of the board of the corporation at which only these directors were present. No such acts of misfeasance are alleged or found in this case.

IV

Seizure by the United States of Property Belonging to One Class of Persons and its Distribution to Another Class in Excess of Their Contractual Claims Thereto, with no Adequate Remedy to the Injured Persons, Constitutes a Violation of the Due Process Provision of the Fifth Amendment.

The Courts have held the Trading with the Enemy Act to be constitutional for the reason that American citizens and non-enemy aliens have had redress against the United States for a wrongful taking and retention of their property by the government. It is clear that in the absence of such statutory safeguards the courts would have held otherwise.

There is no provision in the Act that authorizes the United States to seize property from one person and deliver it over to another in the absence of any contractual claim of the latter. Such an act would be in excess of the constitutional powers of this government.

Furthermore, if there has been a wrongful withholding from depositors and creditors from December 7, 1941 until October 27, 1942, it is the United States that has done such withholding and not the Bank or the stockholders, and there is no justification in law to penalize the latter.

Any interpretation of the Trading with the Enemy Act, as amended, that would reach such a result would render the Act unconstitutional.

Central Union Trust Co. v. Garvan, 254 U. S. 554.
Stoeher v. Wallace, 255 U. S. 239.
Becker Steel Co. v. Cummings, 296 U. S. 74.

CONCLUSION

The identical question is bound to arise in connection with the liquidation of the other closed Japanese banks both in Hawaii and on the mainland. Down to the present time similar litigation has not been commenced in regard to those banks.

If certiorari is denied in this case, the mandate of the Circuit Court of Appeals will issue, the balance of cash available for distribution will be paid to the depositors and creditors of Pacific Bank and the entire interests of the stockholders thereby will be wiped out. Thereafter a favorable determination in a subsequent case would not avail these stockholders as there then would be no funds from which they could be paid.

The attention of the Court is respectfully directed to the fact that this action was commenced during the height of the war, that all parties litigant were hampered by the war situation, and especially that certain of the more important evidence was exclusively within the knowledge and control of officials of the United States Government. Had the record been made under less difficult circumstances, it might have been more concise, however, it clearly shows that the rights of these petitioners have been invaded and it clearly raises the vitally important question of the interpretation and administration of the Trading with the Enemy Act, as amended, especially section 5 (b) (2).

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers

by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment below.

R. A. VITOUSEK
MASAJI MARUMOTO
HENRY F. BUTLER

Counsel for Petitioners

APPENDIX

INSTRUCTIONS REGARDING CONTROL OF JAPANESE CONCERNS IN WHICH TREASURY REPRESENTATIVES HAVE BEEN PLACED

The following is text of Confidential Circular No. 78:

CONFIDENTIAL

TREASURY DEPARTMENT
FOREIGN FUNDS CONTROL

December 9, 1941.

CIRCULAR NO. 78.

The following instructions are for your guidance in connection with the control of Japanese concerns in which Treasury representatives have been placed in accordance with our telegram of December 7, 1941. These instructions are to be in force until further instructions are received by you from this office. On the basis of these instructions you should issue appropriate instructions to the supervisory representatives who are to supervise Japanese concerns under your general direction.

1. The functions to be performed by the Treasury personnel stationed at various Japanese concerns can be divided into (a) the guarding function, and (b) the supervisory function.

The guarding function is to be performed by personnel obtained from various Treasury agencies and additional personnel now being recruited. This work will be supervised by a district coordinator of Treasury enforcement agencies to be designated for each district and whom you will advise as to the institutions in which guards are to be maintained. He will assign the guards, regulate hours, obtain additional personnel and handle all such matters. You will be advised by telegram as to the name and address of the coordinator assigned to your district.

Supervisory Treasury representatives, operating under your general direction, should be installed in all important Japanese establishments. It will of course be necessary to have supervisory representatives, in addition to guards,

in important Japanese establishments such as banks, shipping lines, etc., including establishments in which supervisory personnel have been maintained for some time, even in cases in which operations have been suspended.

The chief national bank examiner of each district will continue to receive reports from any supervisory representatives who are national bank examiners in various Japanese establishments, but copies of such reports will in all cases be furnished to you. In giving instructions to the national bank examiners engaged in supervisory work, you should of course consult with and act through the chief national bank examiner for the district. Matters requiring investigative work should be referred to the foreign funds investigative unit office for your district. If such office has not as yet been set up, the matter should be referred to the district coordinator for your district.

2. All persons including owners and employees should be barred from the premises of Japanese concerns except during periods in which a Treasury representative is in control. Supervisory representatives should determine immediately whether there are tangible assets of the concern on the premises, in warehouses, yards, or places of storage in the same or other locality, or in transit, over which surveillance should be established, and should take steps to see that access to any such tangible assets is prevented except under adequate supervision. No mail should be delivered to such concerns except in the presence of a Treasury representative, who should require all incoming mail to be opened in his presence for his inspection. Each item of outgoing mail should also be examined by a Treasury representative.

3. All account books, letters, and other records should be kept under close observation. In those cases in which you think such action is desirable any such records should be removed to an appropriate place of safekeeping for detailed study and examination.

4. No payments of any nature, other than payments from cash on hand, should be permitted, and cash payments should be permitted only with the prior approval of a supervisory representative. Such approval should be

given only for payments of limited amounts which are clearly necessary in order to prevent immediate hardship.

5. The sale of perishable goods held by Japanese concerns may be permitted under strict supervision provided the proceeds are put into a blocked account in a domestic bank in the name of the seller.

6. In cases in which the continuation of any or all operations of Japanese concerns, other than banks or shipping concerns, is judged by you to be necessary in order to avoid serious dislocation of any vital industry, such operations should be permitted to continue under complete supervision of Treasury representatives. In such cases you are authorized to issue licenses for a period not to exceed 15 days, authorizing transactions which are certified by the supervisory representative to be necessary to the continuation of essential operations of such concerns. Such licenses should not authorize payments, transfers or withdrawals from any blocked account unless approved by the supervisory representative. All such licenses should be promptly forwarded to this office, addressed to the attention of Unit 78, together with a statement as to why the operation of such concern is deemed to be essential. In no case should the Treasury representatives be withdrawn from concerns to which such licenses are issued. The provisions of section 4 above do not apply to concerns covered by this section.

7. You should not license the operation of any Japanese bank, steamship agency, or shipping concern and no such concern should be allowed to operate.

8. Minor retail establishments, such as restaurants, may be allowed to operate under careful supervision, and you are authorized to issue appropriate blanket licenses for periods of not more than one month in such cases when you are satisfied that careful investigation has been made by competent Federal, State, or local agencies and it has been established that the persons concerned are unquestionably loyal to the United States and free of any subversive tendencies. In such cases, if you are satisfied that no possibility of evasion of Treasury control exists and that no substantial advantage is to be gained from the maintenance of continuous surveillance, you may at

your discretion instruct Treasury representatives to make periodic investigations instead of maintaining continuous daily surveillance. In such cases several concerns may be supervised by the same Treasury representative. This section should not be interpreted to apply to any concerns covered by section 6 above. The provisions of sections 2 and 4 above do not apply to concerns covered by this section.

9. In the case of small establishments which in your judgment should not be permitted to operate and in which the only function of the guards is to prevent access to books, files and other records, you may, wherever feasible, instruct the guards to remove such books, files and records to a place of safekeeping, to padlock the premises, and to affix the notice set forth in our telegram of December 9, 1941. The premises so padlocked need not be under constant guard.

10. No notice such as that set forth in our telegram of December 9, 1941, should be placed on premises falling within the categories of enterprises permitted to operate under sections 6 and 8 of this circular. Furthermore, it should be made clear that in all cases, including cases in which a notice has been placed upon the premises of any enterprise, persons may be permitted to enter such premises when express permission is given by the Treasury representative.

11. You should have all supervisory representatives submit immediately a report in duplicate with respect to each concern setting forth:

(a) Name and address;

(b) Nature of business;

(c) A rough estimate of the monthly volume of business;

(d) Description and rough estimate of the value of tangible assets and other realizable assets not blocked in banks;

(e) Latest balance sheet and income statement, if immediately available;

(f) A rough estimate of the total number of employees;

(g) Statement as to whether any of the employees or owners of the concern are known to have been taken into custody or are known to be of an undesirable character;

(h) The nature of the supervision being exercised, number of supervisors and number of guards, if any, assigned to such concern; and

(i) Name of the supervisor making the report and the character of his previous employment.

The original of all such reports should immediately be forwarded to this office by air mail addressed to the attention of Unit 78.

E. H. FOLEY, JR.

Acting Secretary of the Treasury.